EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 14185/14
V.P.
against Estonia

The European Court of Human Rights (Second Section), sitting on 10 October 2017 as a Chamber composed of:

Robert Spano, *President,*
Julia Laffranque,
Ledi Bianku,
Işıl Karakaş,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Registrar*,

Having regard to the above application lodged on 11 February 2014,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms V.P., is an Estonian national who was born in 1928 and lives in X. The President granted the applicant's request for her identity not to be disclosed to the public (Rule 47 § 4). She was represented before the Court by Mr A. Junti, a lawyer practising in Tallinn.

2. The Estonian Government ("the Government") were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the applicant and as they appear from the documents on file, may be summarised as follows.

4. The applicant was born in 1928 and lives in X.

5. The case concerns the suicide of the applicant's son, L., who was born in 1955. He had a history of mental illness (paranoid schizophrenia) and had been placed in a psychiatric hospital fourteen times from 1980. From 1989 he was also classed as a disability pensioner.

6. On 30 April 2012 L. attempted to commit suicide by taking a large number of pills that had been prescribed for him and the applicant. The applicant called an ambulance. L. was diagnosed with intoxication and taken to Hospital Y. An extract from L.'s medical file (*haiguslugu*) contains a reference that after admission to hospital he had intermittently expressed suicidal thoughts. Owing to a lack of space L. was initially placed in the intensive care unit of the renal department. On 1 May 2012 he was transferred from the renal department to the intensive care unit of the department of internal medicine, located on the twelfth floor of the hospital. L. committed suicide on the same day by jumping out of the window.

7. Hospital staff immediately notified the police and the officer who responded to the call wrote up a report. According to the report, documents were drawn up on site, the deceased was photographed and the body was sent for an autopsy, and the doctor on duty gave a statement. The report stated that the doctor had noted that the windows on the twelfth floor did not have locks, and that two nurses on duty had been dealing with another patient in a neighbouring room at the time of the incident. The report also noted that patients were not restrained and kept in their beds in the intensive care unit, as that was considered too extreme a measure.

8. On 1 June 2012 the applicant requested an explanation from the hospital as to why, in particular, the safety of L., who had been a suicidal patient, had not been ensured and why he had not been sent to a psychiatric clinic. According to the reply of 19 July 2012, victims of poisoning were usually taken to that particular hospital as they needed special supervision and care. That had been the case with L., who had been under regular supervision. However, hospital staff had not been with the patient at all times. The reply referred to the fact that symptoms of poisoning usually took one to three days to go away. Patients then had a psychiatric consultation and were transferred for inpatient treatment at a psychiatric clinic or were referred for outpatient care.

9. An autopsy was performed on L. on 2 May 2012. The death certificate (*arstlik surmateatis*) stated that he had died from injuries to his internal organs and that he had fractures of the skull and skeletal bones and trauma to the head, torso and limbs. The death was initially noted as "accidental" (the relevant box on the form having been ticked). A new death certificate

was issued on 5 February 2014, where the cause of death was updated to "suicide" by jumping out of a window.

10. On 30 October 2012 the applicant turned to the Expert Committee on the Quality of Health-Care Services (*Tervishoiuteenuse kvaliteedi ekspertkomisjon;* hereinafter the "Expert Committee"). The Expert Committee heard the applicant and examined the medical documentation concerning L. It also had an expert opinion of one of its members at its disposal. The Expert Committee gave its opinion on 13 December 2012. It found that the psychiatric treatment L. had received had been in compliance with standard medical practice, and that there had been no link between his previous psychiatric treatment and the attempted suicide on 30 April 2012. Placing L. in the renal and internal medicine departments had been justified as he had been in need of medical supervision. His suicidal tendencies had been properly assessed upon his admission to hospital on 30 April 2012. However, the supervision he had been under had been insufficient and the technical characteristics of the building – the fact that the windows could not be closed to prevent people jumping out – had also served as factors contributing to his suicide. The Expert Committee recommended that Hospital Y implement a procedure for the supervision of suicidal patients and train its staff accordingly. It recommended the use of technical solutions to minimise the risk of suicide, such as monitoring equipment in the rooms and windows with shatterproof glass that could not be opened. The Expert Committee noted that its assessment created no legal rights or obligations but that it could be used as evidence in civil proceedings.

11. On 14 May 2013 the applicant lodged an offence report with the local prosecutor's office. The prosecutor analysed three potential offences – manslaughter, manslaughter by negligence and placing a person in danger. However, by a letter of 23 May 2013 he refused to institute criminal proceedings on the grounds that the elements of a criminal offence were lacking. According to the prosecutor, there was no reference to the fact that someone might have assisted L. in jumping out of the window. The prosecutor also noted that hospital personnel were responsible for protecting the life and health of their patients (a so-called duty of care, *garandikohustus*), but he considered that hospital personnel could not objectively be expected to constantly monitor patients or that patients should be tied to their beds or placed in windowless rooms with the door locked. With regard to the offence of placing a person in danger, the prosecutor considered that the height of the hospital and the existence of a window in the hospital room had not, as such, been dangerous, but they had become a threat in the light of L.'s own self-harming activity. Hence, it had not been the medical personnel who had placed L. in danger, rather he had created the danger himself.

12. On 31 May 2013 the applicant appealed to the Office of the Prosecutor General (*Riigiprokuratuur*), referring to the liability of the

health-care provider and the obligation to effectively investigate incidences of death in hospitals. She also noted that it was not clear whether someone else might have been involved in L.'s jumping out of the window. Her appeal was dismissed on 18 June 2013. The Prosecutor General considered that it had been correct to take L. to the regional hospital, Y, where it had been possible to treat him for poisoning, which would not have been possible in a psychiatric clinic. The Prosecutor General also noted that although there had been deficiencies in the training of medical personnel and that the risk of suicide had not been kept at a minimum by applying all the possible technical means, those shortcomings had not reached the level required for criminal liability.

13. On 10 July 2013 the applicant lodged an appeal with the Tallinn Court of Appeal (*Tallinna Ringkonnakohus*), requesting that the court oblige the prosecutor to institute criminal proceedings. She acknowledged that such an appeal had to be filed by a lawyer (*advokaat*) but noted that she had been assisted by a legal adviser (*jurist*) from the Estonian Patient Advocacy Association (a non-governmental organisation promoting patient rights) and asked the court of appeal to make an exception in the question of legal representation in her case. If an exception could not be made, the applicant requested that she be granted legal aid and given more time to draw up a request to that effect.

14. By a decision of 21 August 2013 the Tallinn Court of Appeal declined to examine the appeal since it had not been lodged by a lawyer and there were no grounds for making an exception to that requirement. The court of appeal also rejected the application for more time for lodging a request for legal aid, noting that no reasons had been advanced for the applicant's failure to submit supporting documents in time to prove her lack of means. In addition, the court of appeal noted that the applicant's prospects of success in the appeal were negligible. The refusal to institute criminal proceedings and the decision of the Office of the Prosecutor General had contained detailed reasons as to why there were no grounds to initiate criminal proceedings. The conclusion that the hospital staff had not committed any criminal offence had been well-founded.

15. The applicant then asked the Supreme Court (*Riigikohus*) to grant her legal aid to lodge an appeal against the court of appeal's decision. An appeal to the Supreme Court also had to be lodged by a lawyer. By a decision of 30 September 2013 the Supreme Court refused to grant legal aid. It considered that the decisions of the Prosecutor General and the court of appeal had been well reasoned, showing why no criminal proceedings had been commenced and that an appeal against the court of appeal's decision would have had no prospect of success.

B. Relevant domestic law and practice.

16. The relevant domestic law, namely references to the Obligations Act, the Code of Criminal Procedure and the Penal Code is set out in the case of *Rõigas v. Estonia* (no. 49045/13, §§ 25–47, 12 September 2017).

17. In addition, further references to domestic law are relevant in the instant case.

1. Code of Criminal Procedure

18. Under Article 207 of the Code of Criminal Procedure (*Kriminaalmenetluse seadustik*), a victim can lodge an appeal with the Office of the Prosecutor General against a refusal to institute criminal proceedings.

19. Under Article 208, if the appeal mentioned in Article 207 is dismissed by order of the Office of the Prosecutor General, the victim of an alleged offence may lodge a complaint with the court of appeal. Such a complaint must be lodged through a lawyer (*advokaat*).

2. Health-Care Services Organisation Act

20. The Health-Care Services Organisation Act (*Tervishoiuteenuste korraldamise seadus*) sets out how the provision of health services should be organised and the requirements for such services. It regulates, *inter alia,* the registration of health-care professionals and the recognition of their professional qualifications as well as the licensing of activities in certain fields of health-care services. All such activities are carried out by the Health Board (*Terviseamet*) (Chapter 3 of the Act).

21. In addition, the Health-Care Services Organisation Act regulates the role and competences of the Expert Committee:

> **Section 50(2) – Expert Committee on the Quality of Health-Care Services**
>
> "(1) The Expert Committee on the Quality of Health-Care Services ... is an advisory committee whose purpose is to assess the quality of health-care services provided to patients and to make proposals arising from that assessment to the Health Board, the Estonian Health Insurance Fund and health-care providers.
>
> (2) The Committee's competencies are to:
> 1. assess the quality of health-care services provided to patients;
> 2. make proposals to the Health Board for the initiation of supervisory proceedings over the activity of health-care providers;
> 3. make proposals to health-care providers for assessing the competence of health-care professionals and sending them to in-service training;
> 4. make proposals to health-care providers for changing the way they organise their work; ..."

22. Under section 60 of the Health-Care Services Organisation Act and section 1 of the Statute of the Health Board (*Terviseameti põhimäärus*), the

Health Board is a governmental authority operating within the purview of the Ministry of Social Affairs. It has supervisory powers over compliance with the requirements established for health-care providers. Individuals have the right to submit complaints to the Health Board regarding such compliance.

3. The Minister of Social Affairs Regulation No 128 of 15 December 2004 "Requirements for ensuring the quality of health-care services"

23. Section 3 of the Regulation on the requirements for ensuring the quality of health-care services (*Tervishoiuteenuste kvaliteedi tagamise nõuded*), as in force at the material time, stated that a patient's health-care provider was responsible for the health-care service provided to that person. In order to ensure and develop the quality of health-care services and reduce the risks entailed in the provision of such services, health-care providers had to develop and implement quality management systems in line with good medical and service practice. That quality management system had to, *inter alia*, address the question of ensuring a professional quality and quality in the organisation's management of its work (section 5).

24. Section 8 of the regulation concerned the annual training of health-care professionals in order to ensure their professional development and raise their competence. The provision obliged each health-care provider to draw up a training plan for health-care professionals for each calendar year. In line with such training plans, health-care providers had to ensure at least sixty hours of specialised training for health-care professionals.

4. The Minister of Social Affairs Regulation No 103 of 19 August 2004 "Requirements for types of hospitals"

25. The Regulation on requirements for types of hospital (*Haigla liikide nõuded*) establishes a list of mandatory and permissible inpatient and outpatient services to be provided by general hospitals, central hospitals, regional hospitals, specialist hospitals, rehabilitation hospitals and local hospitals, as well as minimum requirements for staff, equipment and furnishings for the provision of inpatient and outpatient health-care services and for the main facilities used for treatment and diagnostics.

26. As relevant in the instant case, the regulation provides that regional hospitals must provide inpatient and outpatient services in all fields, including emergency and psychiatric care (section 31(1)). It requires certain medical professionals to be present at the hospital at all times, including doctors for emergency treatment, internal medicine and a psychiatrist (section 31(3)). Section 44 provides that in order to offer psychiatric health-care services, certain types of equipment (including stomach pumps in case of poisoning) and rooms that meet certain specifications as to size need to

be available. Among other things, the regulation requires that it be possible to securely isolate and constantly monitor patients. It states that a security alarm should also be provided.

5. Case-law of the domestic courts

27. The relevant case-law regarding criminal and civil remedies is set out in the case of *Rõigas* (mentioned above, §§ 51–64).

COMPLAINTS

28. The applicant complained under Article 2 of the Convention that the authorities had failed to carry out an effective investigation into the circumstances of her son's death. The authorities had not conducted any investigation on their own but had relied only on the documents submitted by her and she, as a private person, had been unable to gather sufficient evidence. The authorities had not dealt with the case thoroughly enough and there had been no clarity as to whether anyone else had been involved in her son's death. The authorities had also failed to examine whether the hospital had had any responsibility for the events owing to a failure to provide sufficient training for its staff, the technical characteristics of the building or for not keeping the patient under proper surveillance.

29. The applicant also alleged under Article 2 that the authorities had had an obligation to anticipate the suicidal tendencies of her son, who was a psychiatric patient and had just attempted suicide, and to take measures to protect his life. The applicant argued that an obligation to prevent suicide should also apply in spheres where the State did not directly exercise authority, such as in hospitals.

THE LAW

Alleged violation of Article 2 of the Convention

30. The applicant complained that the authorities had not carried out a sufficiently thorough and independent criminal investigation into her son's death and that they should have prevented him from committing suicide.

She relied on Article 2, which reads as follows:

> "1. Everyone's right to life shall be protected by law. ...
>
> ..."

1. The parties' submissions

(a) The Government

31. The Government raised an objection of non-exhaustion of domestic remedies with respect to both of the applicant's complaints and submitted that the complaint under Article 2 should be declared inadmissible

32. The applicant had chosen to make use of a criminal-law remedy, namely to submit a report of a criminal offence and to contest the refusal to institute criminal proceedings. However, a criminal-law remedy was applicable only where the actions of a health-care provider had contained elements of a criminal offence punishable under the Penal Code. In the instant case, no elements of a criminal offence had been found and hence criminal proceedings had not been instituted. In the light of such considerations, the attempt to make use of a criminal remedy could not be seen as sufficient to exhaust domestic remedies.

33. The Government noted further that the refusal to institute criminal proceedings had not affected the effectiveness of the available civil-law remedies. The applicant had not tried to invoke any civil-law remedies, although such measures would have been adequate and effective, capable of remedying directly the impugned state of affairs and offering reasonable prospects of success.

34. In addition, as to the exhaustion of civil-law remedies, the Government pointed out that although the applicant had taken her case up with the Expert Committee, that could not be considered as making use of a legal remedy. The Government noted that the Expert Committee was an advisory body whose purpose was to assess the quality of health-care services provided to patients. It did not give opinions on issues of law or resolve claims for damages. In the instant case, although the Expert Committee had referred to shortcomings in the supervision of the applicant's son and the inability to secure the windows in such a way as to avoid suicides, the applicant had not brought civil proceedings against the health-care service provider.

35. As regards the State's substantive obligations under Article 2 of the Convention, the Government submitted that Estonia had an overall legislative framework that guaranteed the quality and safety of health-care services and compelled hospitals to adopt appropriate measures for the protection of their patients. In that regard, the Government referred to the general regulation of health-care services in the Obligations Act and the Health-Care Services Organisation Act and to the regulations of the Minister of Social Affairs regarding the requirements for ensuring the quality of health-care services and those laid down for the various types of hospital (see paragraphs 16-26 above). The Government submitted that there was no indication that the rules on the presence of medical personnel and the availability of required equipment had not been fulfilled in the case

at hand. Against that background, the Government stressed that the positive obligation to protect life could not place an impossible or disproportionate burden on the authorities. Where a sufficient regulatory framework had been set up, errors of judgment on the part of medical personnel or negligent coordination amongst health-care professionals in the treatment of a concrete patient could not bring about a State's liability. The Government also distinguished the case from those such as *Keenan v. the United Kingdom* (no. 27229/95, ECHR 2001-III), concerning a suicidal person in prison, and *Renolde v. France* (no. 5608/05, ECHR 2008 (extracts)), again concerning a prisoner, where the people concerned had truly been under the control of the State.

36. As regards the State's positive obligation under Article 2 of the Convention, the Government submitted that Estonia had an independent and effective system consisting of both criminal-law and civil-law remedies for investigating deaths allegedly arising from medical negligence and establishing the possible liability of those involved, as required by that Article. The Government made reference to the relevant legal provisions and domestic case-law in that regard.

37. Firstly, concerning criminal-law remedies, the Government pointed out that under the Code of Criminal Procedure a person could submit a report of a criminal offence to an investigative authority. Criminal proceedings would be initiated if there were reasons and grounds for doing so, namely if a criminal offence was suspected. The Penal Code provided for criminal liability for manslaughter by negligence, causing serious damage to others' health through negligence and for placing or leaving another person in a situation that was life-threatening or likely to cause serious damage to his or her health. The Government referred to domestic case-law concerning the conviction of health-care professionals and the awarding of damages to victims.

38. Victims could contest a refusal to institute criminal proceedings by lodging a complaint firstly with the Office of the Prosecutor General and ultimately with the Court of Appeal. The Supreme Court had affirmed, for example, that the next-of-kin of manslaughter or murder victims could also be considered as victims. That had been the applicant's course of action in the instant case. However, both the Court of Appeal and the Supreme Court had found, in substance, that although the relevant appeals had been submitted in violation of procedural rules, the substantive appeal itself would have been unlikely to succeed even if it had been submitted by a legal-aid lawyer.

39. Secondly, concerning civil-law remedies, the Government explained that under Estonian law a health-care provider's liability could be contractual (based on violation of a contract to provide health-care services) or non-contractual. The Estonian courts had found that a person could file alternative claims and it was the duty of the court in each case to determine

the legal basis of the claim. Moreover, the Government submitted that an award in respect of non-pecuniary damage could be claimed by a deceased's next-of-kin, both as successors of the deceased for damage caused to that person and in their own capacity for the damage caused to them. Although the existence of exceptional circumstances was required in the latter case, the Government pointed out that the existence of such circumstances was assessed on a case-by-case basis. It was therefore impossible to assert with certainty that such circumstances had existed in the present case without the applicant having had recourse to the national courts first.

40. The Government noted that the applicant could have lodged a contractual or non-contractual civil claim and also relied on the Expert Committee's opinion in that regard.

(b) The applicant

41. As regards the Government's objection, the applicant argued that she had correctly exhausted all the required domestic remedies. She had requested the institution of criminal proceedings and, upon receiving a negative reply, had exhausted her possibilities to appeal against that refusal. The applicant submitted that the suggested civil-law remedy, which had the primary aim of awarding damages, had not been appropriate in her case. Her aim had not been compensation, but the lawful identification of a violation. The applicant also emphasised that in a situation where more than one remedy existed in the domestic legal system, she should only be required to use one.

42. As regards the State's procedural obligation under Article 2 of the Convention, the applicant argued that the authorities had not carried out an effective and sufficient investigation into L.'s death. She stressed that the prosecutor's office should itself also have carried out investigative activities (such as questioning witnesses and collecting other evidence), and should not have simply relied on her request to initiate proceedings.

43. As regards the State's substantive obligation under Article 2, the applicant referred to the same legislation as the Government, but argued that the existence of such measures did not guarantee their lawful application. In the present case, Hospital Y had not had the appropriate facilities to treat L., who had been in need of simultaneous emergency care and psychiatric treatment but had been left to move around freely, regardless of the danger.

44. The applicant argued that L.'s treatment, especially with respect to assessing his mental condition and providing proper treatment and supervision in suitable conditions, had not been sufficiently attentive and appropriate.

2. The Court's assessment

(a) General principles

45. As to the States' obligations under Article 2 of the Convention, it requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 48, ECHR 2002-I; *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; and *Hiller v. Austria*, no. 1967/14, § 47, 22 November 2016). The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health-care policy may in certain circumstances engage their responsibility under the positive limb of Article 2 (see *Powell,* cited above, and *Glass v. the United Kingdom* (dec.), no. 61827/00, 18 March 2003).

46. States are required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives and to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Calvelli and Ciglio*, cited above, § 49; *Hiller*, cited above, § 48; and *Dodov v. Bulgaria*, no. 59548/00, § 80, 17 January 2008).

47. The Court reiterates that if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case (see *Šilih v. Slovenia* [GC], no. 71463/01, § 194, 9 April 2009, and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII). In the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Šilih*, cited above, § 194; *Calvelli and Ciglio*, cited above, § 51; and *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII).

48. The Court also notes that where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (see *Dodov*, cited above, § 82).

49. The Court stresses that the principle of subsidiarity is one of the fundamental principles on which the Convention system is based. It means that the machinery for the protection of fundamental rights established by the Convention is subsidiary to the national systems safeguarding human rights (see, among other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Habulinec and Filipović v. Croatia* (dec.), no. 51166/10, § 26, ECHR, 4 June 2013).

50. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see *Vučković and Others,* cited above, § 70, and *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). To hold otherwise would not be compatible with the subsidiary character of the Convention system (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008).

51. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Vučković and Others,* cited above, §§ 71 and 74, and *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

(b) Application of these principles to the present case

52. The Court will address the preliminary issue of the alleged non-exhaustion of domestic remedies with regard to both of the applicant's complaints together.

53. Although the applicant referred in some of her submissions to a suspicion that someone else might have been involved in L.'s jumping out of the window, there is no indication or evidence that the case involved the intentional taking of life. Hence the Court will analyse the case from the viewpoint of medical negligence in a broad sense. In that regard, the Court notes that it is not only the allegedly negligent acts or omissions of medical doctors in the narrow sense that could be relevant, but also those of medical orderlies or other assisting personnel (see *Dodov*, cited above, § 81).

54. The Court takes note of the fact that the respondent State has enacted an overall regulatory framework for the organisation of health-care services and their supervision (see paragraphs 16 and 20 - 26 above). There is no indication of a failure of the respondent State to ensure the implementation of such a framework nor any sign of a systematic or structural dysfunction in the provision of health-care services that the authorities knew or ought to

have known about (compare *Aydoğdu v. Turkey*, no. 40448/06, §§ 87-88, 30 August 2016). Against that background, the Court is compelled to reiterate that even if there were shortcomings of the hospital in providing adequate supervision for L., as well as in accessing the hospital windows and their functioning – as pointed out by the Expert Committee (see paragraph 10 above) – those elements cannot themselves lead to the conclusion that the criminal remedy was the sole appropriate course of action to address the applicant's complaints.

55. The aforementioned does not mean that the seriousness of those shortcomings could be disregarded at the domestic level. It is precisely in that respect that an efficiently functioning judicial system, capable of establishing the responsibility of health-care service providers and offering adequate redress, becomes important.

56. In the instant case the applicant attempted to make use of the criminal-law remedy provided by domestic law. She lodged an offence report with the prosecutor's office on 14 May 2013. The prosecutor refused to institute criminal proceedings as, based on the facts of the case, the elements constituting a criminal offence were lacking. The applicant's subsequent appeal to the Office of the Prosecutor General was dismissed, as was the appeal to the Court of Appeal as it had not been submitted through a lawyer. The Supreme Court subsequently dismissed the applicant's request to be granted legal aid.

57. As regards recourse to a criminal-law remedy, the Court finds that an unsuccessful attempt to have criminal proceedings instituted by lodging an offence report with the relevant authorities and subsequently appealing against the decision by which the proceedings were not instituted cannot be sufficient to consider that domestic remedies have been exhausted. That is particularly true when, based on the specific facts, no elements of a criminal offence exist and no criminal proceedings are ever instituted and this is promptly made known to the person lodging the report. In the present case the relevant authorities provided a sufficient explanation for why they considered that no elements of a criminal offence existed (see paragraph 11 above). In the light of the provided reasoning, the decision not to institute criminal proceedings cannot be considered arbitrary. In that situation, the Court cannot become a first-instance interpreter of domestic law and replace the national authorities' findings against instituting criminal proceedings with its own.

58. The Court notes further that although the applicant was aware of the existence of civil-law remedies, she did not attempt to make use of them. Since criminal proceedings were never instituted, she did not lodge a civil claim within those proceedings. The applicant did not lodge a separate civil claim against the health-care service provider either. As regards the involvement and opinion of the Expert Committee, the Court has previously found in the Estonian context that recourse to the Expert Committee cannot,

especially taken alone, be considered sufficient to meet the requirement of exhaustion of domestic remedies (see *A.V. v. Estonia* (dec.), no. 3853/14, § 70, 29 March 2016*)*. However, the Expert Committee opinion the applicant obtained could have been used in civil-court proceedings when trying to establish liability on the part of the health-care service provider (see paragraphs 10 and 40).

59. The Court is mindful of the applicant's point of view that her purpose was never to gain monetary compensation by lodging a civil claim against the health-care service provider. However, the Court considers that regardless of whether or not the awarding of damages is seen as the primary goal of a civil claim, civil court proceedings also inevitably presuppose determining the facts of a case, finding out the cause of death and – if justified – establishing the liability of those responsible (see *A.V.,* cited above*,* § 62). Moreover, as stated above, the procedural obligation deriving from Article 2 of the Convention in cases involving medical negligence does not necessarily require States to offer criminal-law remedies (see paragraph 47 above).

60. The Court has had regard to the domestic law and practice which allows medical negligence to be addressed in the civil courts, which can and do award compensation for non-pecuniary damage. Assessing whether such a civil-law remedy would have provided an adequate response and redress in the specific circumstances of the applicant's case was only possible if the applicant had used that remedy.

61. Taking into account the applicant's unsuccessful attempt to initiate criminal proceedings and the fact that she did not lodge a civil claim – while being mindful of the need to guarantee the subsidiary character of the Convention system (see paragraphs 49 to 51 above) – the Court considers that the applicant's complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 November 2017.

Stanley Naismith
Registrar

Robert Spano
President